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Nos. 642, 680, 691, 813, 814 and 815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
THE DELAWARE AND HUDSON RAILROAD CORPORATION,
ERIE-LACKAWANNA RAILROAD COMPANY,
CITY OF SCRANTON,
MILTON J. SHAPP,
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,
Appellants

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY

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STATEMENT

These appeals challenge judgments entered by a three-judge court in the Southern District of New York, in three consolidated cases, denying motions for

a preliminary injunction against orders of the Interstate Commerce Commission authorizing the merger of The Pennsylvania Railroad Company (Penn) with The New York Central Railroad Company (Central). Appellants fall into two categories: (1) certain railroads who claim to be adversely affected by the Commission's action,[1] and (2) one Pennsylvania community and one resident of Pennsylvania.[2] In addition, the United States, which was a statutory defendant in the court below but expressly declined to take any position in that court, has filed a document entitled "Memorandum".[3]

The Commission's orders sought to be enjoined authorized the merger of Penn and Central as of September 30, 1966. Those orders were the culmination of proceedings that had been initiated before the Commission on March 9, 1962, by the filing by Penn and

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[1] The railroad appellants are Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Chicago & Eastern Illinois Railroad Company (C&EI), each of which has filed a separate brief; and Norfolk and Western Railway Company (N&W), Western Maryland Railway Company (Western Maryland), The Chesapeake and Ohio Railway Company (C&O), The Baltimore and Ohio Railroad Company (B&O), The Central Railroad Company of New Jersey (CNJ) and Reading Company (Reading), all of which are represented by a single brief. The last five named carriers are already affiliated with one another, and an application for the right to merge C&O-B&O with N&W has been filed with the Interstate Commerce Commission.

[2] City of Scranton and Milton J. Shapp. Seven other Pennsylvania and New Jersey communities were plaintiffs in the court below. Of these, six did not appeal the decision of the District Court and one, Weehawken, New Jersey, has dismissed its appeal.

[3] This document urges upon the Court issues different from those tendered in the questions presented by any appellant despite the express disclaimer in the memorandum of any intention to do so. See pp. 48-50, *infra*.

Central of an application seeking authority to merge pursuant to Section 5(2) of the Interstate Commerce Act.

Evidentiary hearings before two examiners began on August 20, 1962, closed on September 16, 1964, and consumed 129 hearing days. Some, but not all, of the present appellants intervened prior to or during the course of these hearings and those that did so were given an opportunity to participate and to present evidence.[4]

In March 1965 the examiners issued a detailed and voluminous proposed report and order, recommending approval of the proposed merger. Some of the present appellants filed exceptions to the proposed report.[5] The Commission, in a report dated April 6, 1966, and served April 27, 1966 (327 I.C.C. 475), unanimously affirmed the conclusion of the examiners that the merger of Penn and Central is in the public interest. In reaching this conclusion the Commission found that the merger would permit more economical and efficient use of the applicants' transportation facilities and that the economies realized through the merger would redound in large part to the benefit of shippers and to the general public through improved service and lower rates. 327 I.C.C. at p. 491. The Commission also found, after reviewing the applicants' financial history for a 12-year period, that since 1952 their rates

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[4] Appellants N&W and CNJ did not choose to intervene prior to or during the hearings. C&O-B&O and Reading intervened but presented no evidence.

[5] Exceptions were not filed by N&W, who had at the time still not become a party, or by C&O-B&O or the City of Scranton which were parties. Some twenty parties other than the present appellants which filed exceptions to the proposed report were apparently satisfied with the modifications of that report made by the Commission and have not joined in the present challenge to the Commission's action.

of return have been too low to generate confidence in their financial soundness, to maintain their credit, and to raise the funds necessary for the discharge of their public duties. *Id.* at p. 500.[6] The Commission also found that the merged company would face increasing competition from the "two greatly strengthened rail systems" which had been created as a result of the Commission's prior action in authorizing C&O to acquire control of B&O (317 I.C.C. 261), and N&W to consolidate with the New York, Chicago and St. Louis Railroad Company (Nickel Plate) and the Wabash Railroad Company (Wabash) (324 I.C.C. 1). 327 I.C.C. at p. 519.[7]

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[6] The Commission found that even in 1964 and 1965, a period of relatively high business activity, Penn and Central had a rate of return on net investment in transportation property substantially lower than the return on non-risk government securities in those years. 327 I.C.C. at p. 499. It also found that in the five-year period 1960-1964 neither Penn nor Central earned any profit on its railroad operations. *Id.* at p. 498.

[7] Certain of the appellants have set forth in their brief a tabulation showing the gross railway operating revenues of the Eastern railroads which is apparently designed to create the impression that the Penn-Central system will far overshadow other Eastern railroad systems and create a serious imbalance of competitive strength. See Brief of B&O, *et al.*, p. 4. Gross operating revenues are no indication of financial strength or competitive power. This is illustrated by the fact that in the tabulation the New York, New Haven and Hartford Railroad Company (New Haven), which is bankrupt and has no net income whatsoever, is shown as having 3.2 per cent of all railroad operating revenues in the Eastern market. The truly significant indicia of financial strength and competitive power are figures relating to net railway operating income and return on investment. Statistics derived, like those of appellants, from the administrative record show that in the year 1965 Penn, Central and New Haven had combined net railway operating income of $79,844,000, as against C&O-B&O's $83,468,000, and the N&W system's $117,939,000. In the same year the combined rate of return on investment for Penn, Central and New Haven was 1.84 per cent as compared with 6.95 per cent for N&W, 6.09 per cent for C&O, and 3.34 per cent for B&O.

In authorizing consummation of the merger, the Commission imposed various conditions for the protection of labor and other carriers. Among the conditions so imposed was the requirement that Penn and Central include in the transaction all the freight and passenger operations of the bankrupt New Haven, upon terms to be agreed upon by the parties or imposed by the Commission, subject to the approval of the bankruptcy court. 327 I.C.C. at p. 553. The Commission also imposed certain conditions which were designed to protect the traffic position of appellants E-L and D&H and of the Boston & Maine Corporation (B&M) pending the inclusion of those carriers in a larger rail system. *Id.* at pp. 561-63.

Each of the appellants except Western Maryland filed a petition with the Commission for reconsideration of this report. Unlike the two non-carrier appellants, none of the carrier appellants questioned the desirability of the merger or expressed any opposition to its ultimate consummation. All of the petitioning carrier appellants did object, however, to the special protective conditions imposed by the Commission in its report for the benefit of E-L, D&H and B&M. In addition, E-L and D&H urged that the Commission should withhold authority to consummate the merger until such time as E-L, D&H and B&M had been actually included in a larger railroad system or until such inclusion had been definitely assured.

The protective conditions referred to were imposed by the Commission because of its finding "that when the various consolidations of yards and equipment and the new through routes contemplated by the applicants are effectuated, a substantial amount of traffic could be diverted from E-L, D&H and B&M." 327 I.C.C.

at p. 531. They were designed "to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections." *Id.* at p. 532. The conditions were to continue in effect until such time as the Commission could finally determine the petitions of the three carriers for inclusion in a major rail system or for such other period as the Commission might prescribe. *Id.* at p. 561.

The conditions, described by the District Court as "unprecedented in their severity in the history of railroad mergers" (B&O J.S., pp. A-10-11),[8] were of two kinds. The first enjoined Penn-Central to preserve present practices and patterns (as to both routes of movement and volume) of traffic for which the three carriers compete with Penn-Central. The second required the payment of an indemnity by the merged company to the three carriers in the event that the merger should result, despite the traffic conditions, in diversion of traffic that decreased the relative freight revenues of the three carriers as compared with those of Penn-Central. Specific procedures were also provided for the construction, administration and enforcement of the conditions.

All of the petitioning carrier appellants challenged the conditions on the ground that they had been adopted without adequate notice and hearing. On the merits, however, the grounds of challenge of various of

[8] The District Court opinion, as yet unreported, is printed in the Jurisdictional Statement of C&O-B&O, CNJ, N&W, Reading and Western Maryland. This Jurisdictional Statement will be cited herein as "B&O J.S.", and the brief of the same parties as "B&O Brief."

the appellants were strikingly different. E-L and D&H, together with B&M, urged that the traffic conditions were ambiguous and otherwise inadequate to prevent diversions of their traffic and that the indemnity condition was insufficient fully to compensate them for any losses from diversion of traffic that might occur. They also contended that the Commission should provide for payments to compensate them for any loss in the capital value of their enterprises caused by diversion of traffic as a result of the merger to the extent that any such loss was reflected in the terms upon which they were included in a larger rail system. Some of the other carrier appellants, in contrast, assailed the indemnity condition as likely to have the consequence of causing the merged company, on the one hand, and E-L, D&H and B&M, on the other, to favor each other in traffic routings at their expense, the motive allegedly being on the merged company's part to minimize, and on the part of E-L, D&H and B&M to maximize, potential indemnity payments.

Following the filing of the petitions for reconsideration, the Commission deferred the effective date of its order to September 30, 1966. On September 19, 1966, the Commission served its report on reconsideration. 328 I.C.C. 304. That report rejected various contentions concerning aspects of its prior report relating to matters other than the protective conditions. At the same time, the Commission reopened the proceeding for further hearings to determine whether and in what respects the traffic and indemnity conditions might be modified, including possible modifications to prevent traffic "manipulations" of the kind hypothesized by the carriers other than E-L, D&H and B&M, and to consider also the possible adoption of a condition requir-

ing Penn-Central to compensate the latter roads for any loss in capital value of their enterprises caused by diversion of traffic resulting from the merger. *Id.* at p. 328.

The Commission declined to stay the effective date of its order pending the further hearings just described. It directed, however, that consummation of the merger by Penn and Central would "constitute irrevocable consent on the part of the applicants to any modification resulting from the further consideration herein described and ordered and which are found to be just and reasonable; as well as irrevocable agreement by the applicants to comply fully with the conditions as modified." 328 I.C.C. at p. 329.* The Commission preserved the traffic conditions pending reconsideration and vacated the indemnity provisions but directed that "any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated." *Ibid.*

As noted above, E-L and D&H had argued in their petitions for reconsideration before the Commission that consummation of the Penn-Central merger should be delayed not only until protective conditions satisfactory to all parties had been promulgated by the Commission but until the inclusion of E-L, D&H and B&M in a larger system had been accomplished or assured. In order that this contention may be adequately understood, a brief factual review is necessary.

On March 17, 1961, N&W filed with the Commission an application for authority to consolidate with the

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* With respect to all aspects of the conditions except a possible capital loss indemnity requirement, the consent directed by the Commission was so broad as to preclude to Penn-Central even the right to judicial review. 328 I.C.C. at p. 329.

Nickel Plate and the Wabash.[10] Shortly after the filing of this application E-L petitioned for inclusion in the transaction.

On October 12, 1961, N&W and E-L entered into an agreement providing that in consideration of a withdrawal by E-L of its petition for inclusion, and a change in its intervention from one of opposition to one of support, N&W would upon an approval of its application tender certain financial support to E-L and enter into good faith negotiations toward affiliation with E-L. 324 I.C.C. at pp. 19-20. Thereupon E-L withdrew its petition for inclusion, and during the balance of the proceeding before the Commission it joined N&W in urging strenuously that inclusion of E-L should not be required as a condition to the transaction. *Id.* at pp. 20, 22.

The N&W application was granted by the Commission on June 24, 1964. 324 I.C.C. 1. In its report the Commission, in accordance with the plea of N&W and E-L, declined to require inclusion of E-L (*id.* at p. 26), and noted that petitions for inclusion filed by D&H and B&M had also been denied (*id.* at p. 30). At the same time, however, the Commission directed that E-L, D&H and B&M should each have the absolute right to petition within five years of the date of its order for inclusion in the N&W system, and that consummation of the transaction by N&W would constitute irrevocable consent by N&W to inclusion of those railroads on equitable terms if inclusion was found to be consistent

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[10] Other aspects of this transaction included N&W's purchase of the Sandusky line of the Connecting Railway Company, its acquisition of control of the Akron, Canton & Youngstown Railroad Company through stock ownership, and its lease of certain properties of the Pittsburgh & West Virginia Railway Company.

with the public interest. *Id.* at p. 148. N&W thereafter consummated the transaction.

Meanwhile early in 1963 E-L, D&H and B&M had each petitioned the Commission for inclusion in the Penn-Central system if they should not succeed in obtaining inclusion in the N&W system. Examiners' Report, p. 6. Each of those roads had made it clear, however, that its preference was inclusion in the N&W system, and in September 1965 each petitioned, in accordance with the order of the Commission described above, for a reopening of the N&W-Nickel Plate-Wabash proceeding and inclusion in that system. 327 I.C.C. at p. 488. Proceedings were held pursuant to these petitions before I.C.C. Commissioner Webb who on December 22, 1966, served a recommended report and order, recommending that the Commission direct N&W to include E-L and D&H in its system on specified terms and authorize it to include B&M as well.

In its report of April 6, 1966, in the present case, the Commission noted the pendency of the petitions just referred to. 327 I.C.C. at p. 488. It directed that if those petitions are ultimately denied E-L, D&H and B&M will have the right thereupon to petition for inclusion in the Penn-Central system and to be granted such inclusion on fair and equitable terms if the inclusion is found to be in the public interest. *Id.* at p. 531. It further directed that consummation of their merger by Penn and Central will constitute their irrevocable consent to this condition. *Id.* at p. 555.

In its report on reconsideration the Commission stated that it had considered the arguments tendered in support of the proposition that the merger should be delayed. It thereupon set forth the reasons that

caused it to reject those arguments and to find "that prompt consummation of the merger clearly would be in the public interest." 328 I.C.C. at p. 311.

The first of the reasons referred to by the Commission was its finding that the Penn-Central merger "will eventually produce annual savings of at least $80 million for the applicants," a fact which the Commission found to be "no small factor of public interest" in light of the dismal historical financial record of both Penn and Central. *Ibid.* In relying on this reason for prompt consummation, the Commission expressly recognized that "there is at present a high level of economic activity", but found that to postpone consummation of the merger for this reason "gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential service." *Ibid.*

The Commission next adverted to its earlier finding that "the merger would result in substantially improved service for the large shipping public served by these applicants," stating that this consideration was a "more important" reason for prompt consummation than the dollar savings to the applicants themselves. *Ibid.* It then pointed out that the evidence made it clear that the effects of the merger on E-L, D&H and B&M would be felt only gradually and that it had taken account of this impact in three separate ways: (1) by providing opportunities for inclusion of E-L, D&H and B&M in either the N&W system or the Penn-Central system; (2) by imposing conditions designed to maintain the traffic status quo for those roads pending final determination of their inclusion petitions; and (3) by setting for hearing the question whether and to

what extent those roads should be indemnified by Penn-Central for any permanent impairment of capital values caused by diversion of traffic to Penn-Central. 328 I.C.C. at pp. 311-12.

The Commission recognized that it could not "guarantee absolutely that E-L, D&H and B&M will be included in a major rail system on terms which they find satisfactory," but concluded that this uncertainty did not justify "postponement, perhaps for several years, of large public benefits which will flow from applicants' merger." In this connection it observed that "absent the applicants' merger we see no solution to the New Haven problem;" that "if consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur;" that "we are not prepared to take this risk involved in a substantial postponement of consummation of the merger;" and that "we are not prepared to take the risks which delay of consummation of even 6 or 12 months might entail in providing a solution of the New Haven problem other than liquidation." 328 I.C.C. at p. 312.

In its report on reconsideration the Commission also dealt with and rejected contentions to the effect that it had acted improvidently not only with respect to the effective date of the merger, but in refusing to disapprove the merger on antitrust and other grounds. 328 I.C.C. at pp. 307-10.

On September 8, 1966, prior to the issuance of the Commission's report on reconsideration, E-L filed a complaint in the court below to enjoin the order authorizing the merger which was followed by other complaints and interventions by the remaining appellants

here and by others, all of which were consolidated for hearing below. Penn, Central, the trustees of the New Haven and a number of states and other public bodies intervened in support of the Commission's order. On September 21 the District Court heard argument on applications for preliminary injunctive relief. The court granted leave until September 27 to file additional briefs addressed to the changed circumstances caused by the serving of the Commission's report on reconsideration September 19, and temporarily restrained consummation of the merger pending its further order. On October 4, 1966, the majority of the court below held, in an opinion written by Judge Friendly, that the motions for a preliminary injunction should be denied. One judge dissented on the sole ground that a preliminary injunction should be issued restraining consummation of the merger until the Commission had completed the reconsideration of the protective conditions directed in its September report.

Certain of the appellants perfected appeals to this Court and made applications for a stay of the effective date of the Commission's orders pending consideration of those appeals.[11] On October 18, 1966, this Court entered an order staying the Commission's orders and setting an expedited schedule for briefing and argument.

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[11] B&M, a complainant below, announced on October 7, 1966, that as a result of the Commission's report on reconsideration it is satisfied that the Commission will protect its interests and that it believes the merger should be promptly consummated. See New York Times, Oct. 7, 1966, p. 59. It has not appeared as an appellant in this Court. Also, as noted at p. 2, n. 2, *supra*, only one of the eight community plaintiffs below is an appellant here.

SUMMARY OF ARGUMENT

I

The Commission found that the merger of Penn and Central is in the public interest because it will provide substantial benefits in terms of improved service and reduced rates for shippers and the public generally. It was then faced with the question whether it should defer the merger, thereby at best postponing the date when the public would begin to enjoy those benefits and perhaps jeopardizing its ultimate consummation which holds out the only feasible hope for preserving the transportation operations of the New Haven, in order to work out some of the details of the conditions prescribed for the benefit of three smaller railroads. The Commission weighed the competing considerations and determined that in the circumstances the public interest would best be served by prompt consummation. This was a decision that under the statute the Commission was authorized to make. The decision reflects the Commission's informed and expert judgment and rests upon rational and well considered grounds. The Commission's exercise of its statutory discretion should not be disturbed.

A. There is no rule of law that forbids the Comission to permit the merger of Penn and Central to go forward before it has finally determined the precise content of protective conditions for E-L, D&H and B&M. The Commission, in authorizing mergers of rail and motor carriers, has frequently deferred questions relating to the inclusion of other carriers or the formulation of conditions for the protection of employees. No case cited by appellants casts any doubt on the authority of the Commission to follow the course that it did. Indeed, for the Commission to

have done otherwise would have been inconsistent with the directive of this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, that administrative action otherwise appropriate should not be delayed because of apprehended consequences that can be separately dealt with in due course.

B. Consummation of the merger will in no way interfere with or impair the right or opportunity of any of the appellants to effective judicial review of the protective conditions ultimately adopted by the Commission. If those conditions are inadequate to protect E-L, D&H and B&M, the courts may be expected to remand the case for the formulation of conditions that give those carriers the degree of protection to which the Commission has found them entitled. And if the conditions adopted by the Commission unlawfully injure other carriers they can secure appropriate relief from the courts.

C. There is no merit in the claim of N&W, C&O-B&O and certain additional carrier appellants that the Commission is virtually certain to adopt indemnity conditions that will give Penn-Central, on the one hand, and E-L, D&H and B&M, on the other, the opportunity and incentive to manipulate traffic patterns in a way that injures them. Nor is there merit in the contention that because the named carriers will anticipate the adoption of such conditions on a retroactive basis they will begin to manipulate traffic immediately upon consummation of the merger. In fact even under the indemnity conditions originally adopted by the Commission there would have been no opportunity or incentive for the alleged traffic manipulation. In any event, the Commission has expressly indicated its intention to take whatever action may be appropriate or

necessary to deal effectively with the question of manipulation. Under these circumstances, there is no credible reason why Penn-Central, E-L, D&H and B&M would be motivated to manipulate traffic pending adoption of final protective conditions and no basis for apprehending that any conditions adopted will reward or permit manipulation.

D. E-L and D&H will suffer no injury by reason of consummation of the merger prior to final action on protective conditions. The traffic conditions originally prescribed by the Commission, which were designed to preserve the status quo as to routes, gateways, rate benefits and services, will be in effect from the outset, and there is no reason to believe that they will provide insufficient protection particularly during the early post-consummation period when the effects of the merger will not yet be fully felt. The Commission has reserved the authority to make any indemnity provisions retroactive to the date of the consummation of the merger, and to prescribe a capital loss indemnity provision if it concludes that one is warranted. The Commission has thus already adopted measures that assure to E-L and D&H the protection to which they are entitled not only in the period after prescription of the final protective conditions but also in the period between consummation of the merger and the prescription of those conditions.

II

The argument of the Department of Justice that the merger should be deferred pending Commission action on inclusion is not properly before this Court. It has not been raised in the Questions Presented of any appellant. Moreover, it was not presented either to the court below or even to the Commission in peti-

tions for reconsideration. The argument made to the Commission and in the court below relating to delay and inclusion—that the merger should not be permitted to go forward until the inclusion of E-L, D&H and B&M has been actually "accomplished or assured" —was expressly considered and rejected by the Commission on the ground that such delay could frustrate the merger and deprive the public of its benefits. This conclusion was plainly within the Commission's competence. The reasons given by the Department of Justice for delay are insufficient in point of fact, inconsistent with the announced judgment of the executive agencies of the Government that the merger is in the public interest and should be consummated promptly, and insufficient as a matter of law because they represent nothing more than criticisms of the Commission's wisdom in deciding questions committed by Congress to its informed judgment.

III

The argument that the Commission did not make adequate and correct findings to support its conclusion that the merger should not be further delayed rests on a misreading of the relevant passages in the Commission's report. The Commission held that delay in the merger of any significant duration would *pro tanto* deprive the public and the parties of important benefits in terms of service and savings, and would imperil a solution of the problems of the New Haven. These findings were correct and fully support the conclusion reached by the Commission.

IV

There is no substance in the attack made by the appellants Shapp and the City of Scranton on the merits

of the Commission's orders approving the merger. Neither of these appellants has shown any legally protected interest of its own that the merger threatens to invade, and hence neither has standing to challange the Commission's orders in the courts. In any event these appellants have advanced no arguments that provide any basis for invalidating the Commission's orders. The Commission did not, as these appellants contend, misconstrue or misapply the public interest standard of Section 5(2) but in fact construed and applied that standard in strict accordance with decisions of this Court. The validity of the Commission's orders does not depend upon traffic projections for any one year, as alleged by appellants, since they are based on its findings that the financial situation of Penn and Central appraised over a period of years shows that the merger is necessary if those carriers are effectively to discharge their responsibilities under the Interstate Commerce Act. The Commission did not err in its appraisal of the competitive consequences of the merger. In dealing with that aspect of the case the Commission made scrupulous and detailed findings that comply with the standards laid down by this Court in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 186, and *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154. In substance appellants' arguments merely quarrel with the wisdom of the Commission's appraisal of complex questions of public policy and transportation economics that Congress has authorized it to decide. This Court has held that such arguments do not raise issues that are appropriate for judicial review. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88; *Minneapolis & St. Louis R. Co.* v. *United States, supra,* at p. 188.

ARGUMENT

Introduction

The issues on this appeal should be considered in the light of the Commission's findings on the merits of the proposed merger. The Commission found that the economies realized through the merger "will redound in large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates." 327 I.C.C. at p. 491. It noted that the merger has met with the almost unanimous approval in principle of shippers throughout the nation. *Ibid.* It recognized that the merger presents perhaps the only solution to the problems besetting the New Haven. 327 I.C.C. at p. 522. See also 328 I.C.C. at p. 312. On the basis of these findings the Commission reached its ultimate finding that the merger is in the public interest. This finding is not contested by any of the carrier appellants. And the Department of Justice affirmatively represents that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected." D.J. Memo., p. 21.

Having made these findings it was necessary for the Commission to determine when Penn and Central should be permitted to consummate the merger so that the task of achieving the public benefits could begin. In resolving this question the Commission was assailed with a variety of claims, some inconsistent with others, that were advanced by the carrier appellants to justify delay. While some of these claims purported to appeal to considerations that to a degree touch

the public interest others were obviously directed to considerations that relate primarily to the private interests of the carriers asserting them.

In these circumstances it was necessary for the Commission to weigh the competing considerations with which it was faced and to determine what course would best serve the public interest. On the one hand, additional delay in the merger would necessarily further postpone the time when the shipping public and the parties could begin to receive and to enjoy the benefits of the merger, and any substantial or indefinite delay involved the risk of jeopardy to the merger itself and thereby jeopardy to any resolution whatsoever of the New Haven's problems. On the other hand, the claims of the carrier appellants raised issues which were subject to the Commission's control and authority and with which the Commission could deal fairly and effectively after the merger had been consummated. In these circumstances the Commission in its report on reconsideration determined that because of the disadvantages and hazards inherent in delay the public interest would best be served by a prompt consummation of the merger, with the Commission reserving effective power thereafter to adjust the various claims advanced by the carrier appellants in a manner that satisfies the standards of the Interstate Commerce Act.

We submit that the Commission's resolution of the problem before it—a problem that called for the application of its expert and informed judgment—was a rational and considered one, and that in reaching its decision the Commission acted well within the ambit of the broad authority entrusted to it by the Congress.

In thus determining that the merger should be promptly consummated rather than delayed until all collateral and contingent problems raised by it had been solved, the Commission adhered to the course which it had followed in dealing with the two other major railroad merger cases in the East. In a proceeding involving the application of C&O, filed on June 14, 1960, for authority to acquire control of B&O, which has been generally regarded as the first step toward a restructuring of the Eastern railroads into three major systems, the Commission was asked to postpone completion of the transaction and to consolidate the proceeding with the N&W-Nickel Plate and the Penn-Central merger cases. This proposal was advanced on the ground that the magnitude of the proposed transaction and its impact on carriers not included in any of the three proposed consolidations justified postponement of decision and treatment of the three applications as a single integrated transaction. The proposal was resisted by both B&O and C&O and the Commission found that the public interest required that it decide the application without delay. 317 I.C.C. at pp. 263-66. Again when the Commission was considering the proposed merger of N&W and Nickel Plate certain of the parties urged that the proceedings should be consolidated with the Penn-Central proceeding on the ground that only through consolidation could a clear picture be obtained of the effects of the proposed mergers on E-L, D&H and the New England lines. N&W opposed this proposal and again the Commission found that since it had determined that the proposed merger would be in the public interest it should be approved and consummated without delay. 324 I.C.C. at pp.

16-19.[12] The Commission's action in this case is therefore altogether consistent with the course that it adopted in the C&O-B&O and N&W merger cases at the insistence of some of the very appellants that are now insisting upon delay.

In this brief we shall first deal with the many contentions—some of which are diametrically opposed to others—offered by the various carrier appellants and the Department of Justice in support of the proposition that the Commission should not have permitted prompt consummation of the merger, and that the District Court erred in failing to set its orders aside insofar as they authorized prompt consummation. Thereafter we shall discuss the arguments alleged by the two non-carrier appellants to demonstrate that the merger is fundamentally illegal and may not lawfully be consummated now or in the future.

Before proceeding to a discussion of these issues, however, certain preliminary observations are in order:

The carrier appellants take pains in their papers to suggest to this Court that all that is at stake is "a brief postponement" of the merger until final Commission action on protective conditions. See, *e.g.*, B&O Brief, p. 41. At other points in those papers, however, the real implications in terms of delay of appellants' contentions become apparent. Thus D&H states that its real position is that consummation

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[12] Penn and Central made large contributions to the success of the merger transactions just discussed. In order to make the creation of the N&W system possible, Penn placed the Wabash and the Sandusky line in that system and trusteed its substantial stock interest in N&W pending disposition of that interest. See 327 I.C.C. at p. 487. In connection with C&O's acquisition of control of B&O, Central conveyed its substantial block of B&O stock to C&O.

of Penn-Central should be delayed "until D&H is actually included in one of the major systems," a process that it recognizes may take "several years." D&H Brief, pp. 14, 39. And the proposal of D&H is modest in its potential for delay as compared with the arguments advanced by C&O-B&O, N&W, Reading, Western Maryland and CNJ. These carriers contend that "the Penn-Central merger cannot be found to be in the public interest unless and until the other railroads serving the East can be so restructured or otherwise protected that their ability to compete against the huge Penn-Central system is assured," and describe the merger of N&W-C&O-B&O, a proposal upon which Commission hearings have not even begun, as the only method of creating a "balanced competitor." B&O Brief, pp. 25, 47. If these arguments are accepted these appellants, in the course of their attempt to exact approval of the N&W-C&O-B&O merger as the price for permitting the public to receive the benefits of the Penn-Central merger, may well nibble the Penn-Central merger to death by a series of delays each of which will be justified on the ground that it is brief. The arguments of appellants, we submit, leave no doubt that the present controversy is only the initial step in a campaign to secure a delay of indefinite duration.

It is, moreover, important to realize that even putting aside arguments relating to inclusion and to the N&W-C&O-B&O merger, the legality of the Commission's action here cannot realistically be appraised on the basis that the question is simply whether there should be delay until the Commission has finally acted on protective conditions. The carrier appellants' briefs reveal that the minimum that they really seek so

far as protective conditions are concerned is delay not merely until the Commission has acted, but until the process of judicial review of the Commission's action has been finally completed. Thus, for example, the argument made by every carrier appellant that judicial review of the protective conditions will be frustrated if the merger is permitted to be consummated before they are finally formulated (discussed at pp. 30-33, *infra*) is one that has relevance only to the question whether the merger should be postponed until after such judicial review has been completed.

With these points in mind, we now turn to the contentions of the various appellants.

I. The Fact That the Orders of the Interstate Commerce Commission Permit the Merger To Be Consummated Prior To Final Disposition of the Matter of Protective Conditions Does Not Invalidate Those Orders

In their petitions for reconsideration of the Commission's April 6, 1966, report the petitioning carrier appellants all challenged the conditions there imposed for the protection of E-L, D&H and B&M on the ground that they had been adopted without adequate notice and hearing. This challenge was repeated in the complaints and intervention papers filed in the District Court prior to the serving of the Commission's report on reconsideration on September 19, 1966. As the District Court noted, that claim was "shattered by the Commission's report on reconsideration" since as a result of that report "all interested parties are now to be fully heard." B&O J.S., p. A-22.

The surviving challenges of the Commission's action in authorizing consummation of the merger while setting the question of protective conditions for further

hearings are essentially as follows: (1) the Commission is powerless as a matter of law to permit consummation of the merger without first finally determining the content of the prescribed protective conditions; (2) consummation of the merger prior to that determination will deprive the parties of adequate judicial review; (3) the Commission is likely ultimately to adopt protective conditions that will encourage E-L, D&H, B&M and Penn-Central to manipulate traffic away from N&W, C&O-B&O and the other carrier appellants to their injury, and indeed the very likelihood of adoption of such conditions on a retroactive basis will itself cause traffic manipulation of this kind even prior to any actual adoption of them; and (4) there is no assurance that the Commission after reconsideration will adopt protective conditions that adequately protect E-L and D&H.

None of these contentions provides adequate cause for setting aside the District Court's decision refusing to overturn the Commission's action.

A. THE COMMISSION HAS THE AUTHORITY TO PERMIT THE MERGER TO TAKE PLACE BEFORE THE PROTECTIVE CONDITIONS ARE FINALLY DETERMINED

In arguing that the Commission was without power as a matter of law to authorize consummation of the merger prior to final Commission action on the question of protective conditions, appellants point to the provisions of Section 5(2) of the Interstate Commerce Act. See, *e.g.*, D&H Brief, pp. 23-27. That statute provides in pertinent part that in the case of a proposed railroad merger "if the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the

proposed transaction * * * will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable." Appellants contend that properly interpreted, this provision forbids the Commission to authorize consummation of this merger before the Commission has finally determined the precise content of all of the protective conditions that the Commission has found to be "just and reasonable". We submit that, as the District Court held, there is "no such categorical imperative in the Interstate Commerce Act" (B&O J.S., p. A-22), and that the appellants have simply misinterpreted the quoted statutory provision.

In the instant case the Commission has determined that it is "just and reasonable" that E-L, D&H and B&M be given protection against untoward injury as a result of the merger. It has prescribed traffic conditions effective on merger. It has reserved the right to make changes in other conditions that it originally prescribed in the light of objections to those conditions made by the parties. It has, moreover, made a condition of the merger an irrevocable consent by Penn-Central to the imposition of whatever protective conditions the Commission may find appropriate after further hearing to protect E-L, D&H and B&M from untoward injury, without even a right to judicial review except as to any capital indemnity provision that may be imposed. At the same time, the Commission has decided that because there are pressing reasons for prompt consummation of the merger the public interest requires that the determination of the precise method of implementing the term and condition that E-L, D&H and B&M receive adequate protection

should not be permitted further to delay that consummation.

This course fully complies with the terms of the statute. The Commission in Section 5(2) proceedings frequently imposes terms and conditions whose implementation requires additional proceedings after the consummation of the merger. As pointed out by the Interstate Commerce Commission in its Response to the Applications for a Stay in this Court (pp. 7-8), this is often done by way of conditioning Commission approval of a railroad merger upon the applicants' acceptance of inclusion of other railroads at a later date if the Commission so directs—a situation where, it may be noted, the ultimate uncertainty is far greater than is the case with respect to the protective conditions here.[18] Furthermore, the Commission's action here is consistent with that taken in a series of Commission cases arising, like the present case, under Section 5(2) whereby the Commission deferred all or part of the question of employee protection and reserved jurisdiction "to make additional findings and impose such terms and conditions with respect to employees * * * as may be necessary * * *." *A. C. Allyn and Co. et al.—Control,* 50 M.C.C. 305, 310-11 (1948). Accord, *The Greyhound Corp.—Control,* 57 M.C.C. 123, 156-57 (1950); *The Greyhound Corp.—Merger,* 70 M.C.C. 59,

[18] In New York Central Unification, 154 I.C.C. 489 (1929), the Commission expressly found that preservation of certain short-line railroads was required by public convenience and necessity and authorized the lease transaction under consideration only on condition that New York Central acquire them, but permitted consummation of the lease transaction before the terms of their acquisition had been determined. See also Alton R. Co. Acquisition, 175 I.C.C. 301, 313 (1931), 189 I.C.C. 271 (1933); Union Pacific R. Co. Unification, 189 I.C.C. 357, 363 (1933).

68-69 (1956); *Safeway Trails, Inc.—Control*, 70 M.C.C. 573, 577-78 (1957).

The action of the Commission here finds additional support in cases decided by this Court. Thus in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, the Commission had issued a motor carrier certificate to a wholly-owned subsidiary of a railroad "solely for the purpose of enabling [the subsidiary] to perform a service auxiliary to and supplementary of rail service" and had reserved the authority subsequently to issue "such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplementary to the train service * * *." 340 U.S. at pp. 441, 424. This Court held that this reservation of authority to prescribe the means of insuring adherence to the limitations embodied in the original certificate was within the power of the Commission. See also *American Trucking Ass'ns, Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133; *American Trucking Ass'ns, Inc.* v. *United States*, 355 U.S. 141.

The District Court correctly found that the action of the Commission was also closely analogous to that approved by this Court in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 392. There it was held that it was appropriate for the Federal Power Commission to issue a certificate under Section 7 of the Natural Gas Act without making a final determination with respect to the vital matter of price so long as the certificate was conditioned "so that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined" in subsequent hearings.

In arguing that the Commission is without authority as a matter of law to permit consummation of the merger before the protective conditions are finally formulated, appellants primarily rely upon *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941. See, *e.g.*, B&O Brief, pp. 24-25. That case holds no more than that in determining whether to license a particular power project, the Federal Power Commission is obligated to consider all possible alternative projects, since the relevant statute requires the project licensed to be "best adapted to a comprehensive plan for improving or developing a waterway." 354 F.2d at p. 612. In that case the Commission had approved a particular project and in doing so, the court found, had "failed to make a thorough study of possible alternatives." *Ibid.* The court remanded the case to the Commission with directions to consider the various alternatives and directed that in the course of that consideration the Commission thoroughly investigate the question of fish protection before making its choice.

The present case bears no resemblance to *Scenic Hudson*. Here the Commission is not enjoined by statute to choose among a number of possible merger transactions but is directed by statute to approve a particular transaction proposed by the parties if it finds it to be in the public interest. That is precisely what the Commission has done.

Some of the appellants rely on *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, asserting that the Commission has engaged in the kind of "piecemeal" administrative action condemned in that case. See B&O Brief, p. 26. There the Commission

had refused to approve a carrier's new rate schedule on the ground that it might have undesirable collateral consequences. This Court stated that the proper course was for the Commission to deal with any such consequences when and if they occurred and that to defer an otherwise proper transaction for this reason "was not a full discharge by the Commission of an immediate responsibility," but "inaction and postponement" whereby "responsibility was shifted from the shoulders of the present to the shoulders of the days to come." 294 U.S. at p. 510.

We submit that the course taken here by the Commission is not merely consistent with, but is strongly supported by, this Court's strictures in the cited case. The Commission here refused to defer a transaction that it has found to be in the public interest simply on the basis of conjectural arguments as to the possibility of undesirable future consequences and thereby undertook "a full discharge * * * of an immediate responsibility." It is the appellants who are here urging "inaction and postponement" of the kind condemned by this Court.

B. PROMPT CONSUMMATION OF THE MERGER WILL NOT DEPRIVE THE PARTIES OF EFFECTIVE JUDICIAL REVIEW OF THE PROTECTIVE CONDITIONS

The carrier appellants argue that if the merger is consummated before the Commission has promulgated its final protective conditions, they will be irreparably injured by being deprived of effective judicial review of those conditions. See, *e.g.*, E-L Brief, pp. 45-49. The basis of this argument is the proposition that under conventional principles relating to judicial review of agency action, the court does not have the power to do more than "lay bare" any error

of law in the Commission's action and remand the case for further proceedings, so that the Commission may fail again on remand to fashion conditions that will pass judicial muster on another appeal.[14]

The dark picture thus painted by appellants of what the District Court characterized as "an infinite regression" (B&O J.S., p. A-36), is, as that court found, wholly without substance. There is no rule of law that forbids a court, when setting aside agency action, fully to explicate its reasons for doing so in order that on remand the agency may exercise its administrative functions in a way that will survive subsequent judicial scrutiny. In so doing the court in no way usurps any administrative function but rather affirmatively assists the agency in discharging its own function by indicating the outer boundaries within which its discretion must be exercised in order to be affirmed on review.

Appellants' argument on this point ignores the admonitions of this Court that "courts and administrative agencies are collaborative 'instrumentalities of

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[14] Certain of the appellants assert that if the merger should be consummated and the Commission thereafter "resort to an illegal revenue pool" to protect E-L, D&H and B&M, and a reviewing court should then set aside those conditions, the result "would be a consummated Penn-Central with inadequate protection for the remaining railroads" and that in these circumstances "judicial review would be an idle ceremony". B&O Brief, p. 33. This assertion is plainly wrong; the fact that the merger is consummated could not impair in any degree the court's power to remand the case to the Commission or the power of the Commission to prescribe new conditions that complied with standards laid down by the court. In this connection it is important to bear in mind that under the Commission's order any financial provisions that may ultimately be prescribed will be retroactive to the date of the consummation of the merger.

justice,' and not business rivals" (*United States* v. *Ruzicka,* 329 U.S. 287, 295), and that

> "* * * [C]ourt and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action." *United States* v. *Morgan,* 307 U.S. 183, 191.

It may be conceded that if an agency were to be unremittingly hostile to the reviewing court it could perhaps intentionally transgress any guidelines set down by the reviewing court to mark the outer perimeters within which the agency action must fall, and thus temporarily prevent a final resolution of the matter in issue. We do not understand any appellant to hypothesize the possibility of any such attitude on the part of the Commission in this case, nor do we know of any foundation upon which such a hypothesis could be based.

The case primarily relied on by appellants in this portion of their argument is *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17. See, *e.g.,* E-L Brief, pp. 46-47. That case holds no more than that when an agency has granted a license on certain conditions, a reviewing court exceeds its function by striking down those conditions and leaving the license in effect, since it is for the agency rather than the court to decide in the first instance whether to issue the license without conditions or whether to withhold it entirely. Nothing in the case bears on the propriety of a court's explaining in any detail it sees

fit the reasons why agency action has been set aside, in a way that provides the agency with a well-defined framework within which to exercise its discretionary duties.

C. THERE IS NO BASIS FOR THE CLAIM THAT THE PROCEDURE UTILIZED BY THE COMMISSION WRONGFULLY EXPOSES THE CARRIER APPELLANTS OTHER THAN E-L AND D&H TO SERIOUS INJURY

N&W, C&EI and C&O-B&O, together with the latter's affiliates CNJ, Reading and Western Maryland, attack the procedure utilized by the Commission on the ground that it subjects them to irreparable injury. This argument rests upon the following series of assumptions:

(1) The indemnity provisions originally incorporated by the Commission in the protective conditions would have provided an incentive for Penn-Central to divert traffic from carriers other than E-L, D&H and B&M to the latter carriers and for the latter carriers to divert traffic from other roads to Penn-Central, and would have resulted in such diversions on a large scale and inflicted serious injury on those other roads; and these provisions will probably be reinstated by the Commission.

(2) Even during the period before new protective conditions are promulgated it must be assumed that Penn-Central and E-L, D&H and B&M are certain to assume that any new order made by the Commission in the reopened proceedings will prescribe, on a retroactive basis, indemnity provisions like those originally adopted and later rescinded; for this reason substantial traffic diversion will begin as soon as the merger is consummated.

Considering first the second of these assumptions, it should be kept in mind that the Commission in its

order reopening the proceeding gave notice that on an appropriate showing it would give specific consideration, in connection with the entry of any new indemnity provisions, to taking appropriate measures to deal with traffic diversion or manipulation of the kind assumed in appellants' argument. 328 I.C.C. at p. 328. There is therefore no basis for appellants' claim that Penn-Central, E-L, D&H and B&M will or are likely to anticipate that the Commission will prescribe a provision for indemnification that will reward traffic manipulation. Appellants' argument requires acceptance of the proposition that at the very time the Commission is considering the formulation of a method of indemnity that will not reward traffic manipulation, either for the past or for the future, Penn-Central and the three protected roads will be motivated to and will deliberately engage in such manipulation. There is simply no credible basis for any such supposition.

The other assumption rests on the premise that the Commission will ultimately find that there is no way to protect E-L, D&H and B&M except indemnification provisions that would cause serious diversion of traffic from other carriers as a result of traffic manipulation. See, *e.g.*, B&O Brief, p. 29.[15] On the basis of

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[15] Appellant C&EI erroneously contends that the Commission has "committed itself" to indemnity arrangements of a kind that would reward traffic manipulation, and indeed at a number of points goes so far as to argue as if the indemnity provisions in the Commission's April report had never been rescinded. See, *e.g.*, C&EI Brief, p. 25:

> "The court below clearly erred in permitting the merger to be consummated and the indemnity conditions to become effective simultaneously therewith, without assessing their impact on other carriers."

this premise the carrier appellants other than E-L and D&H argue that the merger should be postponed so that the Commission will, when it belatedly recognizes that fact, have an opportunity to conclude that the public interest requires postponement of the merger rather than its consummation upon such conditions. This alternative of additional delay, it is pointed out, will be irrevocably lost upon consummation of the merger prior to final determination of protective conditions. *Id.* at pp. 27-28.

The threshold difficulty with this position is that the Commission has already considered and rejected the alternative of further delay. In their petitions for reconsideration before the Commission, certain of the carrier appellants objected to the indemnification provisions on the ground that they would result in traffic manipulation and thereby injure them. In deciding that the merger should nevertheless go forward, despite the possibility of ultimate reimposition of comparable indemnification provisions, the Commission necessarily concluded that the claims of injury of these carriers were insufficient to outweigh the strong public interest factors militating in favor of prompt consummation of the merger. We do not understand these appellants to argue that the Commission had no authority to make such a determination under the terms of the Interstate Commerce Act, and in fact there is nothing in that statute that guarantees to carriers freedom from injury caused by the merger of other carriers or circumstances relating thereto.

There are other defects in this branch of appellants' argument. In the first place, it is flatly inconsistent with their vigorous contention that reimposition of indemnification provisions would violate the

"pooling" provisions of Section 5(1) of the Interstate Commerce Act. 49 U.S.C. § 5(1). Although we believe that this contention is invalid (see pp. 44-46, *infra*), it is evident that there is a basic inconsistency in the simultaneous arguments that (a) the merger must be postponed because of considerations relating to the possible reimposition of particular conditions and (b) such conditions if imposed would be unlawful. If appellants' latter point is valid, nothing will prevent them from seeking appropriate judicial relief from the conditions if they are in fact reimposed.[16] The claim that the Commission may in the future adopt illegal conditions that if permitted to stand would injure appellants cannot reasonably be thought to entitle appellants to relief now.

Another flaw in appellants' argument is its assumption that any indemnification provision that might ultimately be imposed will encourage large scale traffic manipulation to their serious detriment. The fact is that even under the indemnity provision as originally promulgated no significant traffic manipulation of the kind hypothesized would have occurred. In the court below detailed affidavits were filed on behalf of Penn and Central which showed that neither Penn-Central nor any of the other carriers mentioned would have any substantial power, opportunity or incentive to divert traffic in the manner assumed by appellants' argument. These affidavits did not consist simply of general assertions, but dealt specifically and in detail with examples that appellants advanced as tending to

[16] As we have shown at pp. 30-33, *supra*, despite appellants' arguments to the contrary consummation of the merger would not interfere with effective judicial review of the protective conditions promulgated by the Commission.

prove the possibility of large-scale diversion of the kind alleged.[17] Appellants did not attempt to refute them by reply affidavits.

Moreover, as has already been pointed out (pp. 33-34, *supra*), the Commission in its report on reconsideration expressly adverted to the contentions made by certain appellants with respect to the tendency of the particular indemnification provisions originally adopted to cause traffic manipulation, and indicated its intention to consider this question in formulating final conditions. Accordingly, it may be expected that if the Commission finds it appropriate in the public interest to do so, it will make any modification of the original indemnification provisions found necessary to prevent serious traffic manipulation.[18]

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[17] See affidavits of John G. Patten. R. 785-820. Some of the appellants assert that the affidavits were not directed to the question of potential traffic manipulation motivated by the indemnity provisions. B&O Brief, p. 37. In fact they were addressed specifically and directly to that subject. Thus, for example, the affidavits considered specific examples of traffic alleged to be susceptible to manipulation and showed, among other things, that because of the structure of divisions the putative manipulation would not increase but would in fact decrease the revenue of the manipulating line (R. 794, 795, 796-97, 799, 800); that manipulation would deprive the manipulating line of the long haul and thereby reduce its revenue (R. 797-98, 802, 808, 812); that in some instances the traffic in question was covered by contracts with shippers that would make manipulation impractical (R. 810); and that in other instances the historical pattern of the traffic demonstrated that it was controlled by the shipper to a degree and in a way that would make manipulation impractical (R. 794-95).

[18] The Commission might, for example, specifically forbid manipulation of this kind, with the sanction so far as E-L, D&H and B&M are concerned being the possible loss of all or part of any indemnities otherwise due them, and in the case of Penn-Central being that specified in the statute for violation of Commission orders.

Finally, appellants' argument ignores the fact that the Commission may decide (a) that the present traffic conditions, or modified traffic conditions, are themselves sufficient to guard E-L, D&H and B&M from undue injury, or (b) to formulate a mode of financial indemnification basically different from that originally promulgated in the Commission's original report, and not even arguably providing any impetus for traffic manipulation. For example, the Commission might conclude to adopt a procedure whereby, during the protective period, E-L, D&H and B&M would be given the right periodically to show the extent of any traffic losses to Penn-Central caused by the merger, under a realistic standard of proof, and to receive compensation therefor.

It is appropriate to note that the entire argument with respect to the tendency of indemnity provisions to cause large-scale traffic manipulation is as to most of the carrier appellants highly suspect in light of their course of action before the Commission. N&W, CNJ and Reading, all of which now profess fear that such manipulation will take place to a degree that will actually impair their ability to render service, did not consider the matter sufficiently important to warrant even mention in the petitions for reconsideration that they filed with the Commission. C&O-B&O gave the point only the most cursory mention in their petition, and Western Maryland did not even file a petition. It seems reasonable to assume that if the matter were in fact as significant as now suggested these carriers, which have not been lacking in alertness in the protection of their interests during these proceedings, would have given it more attention before the Commission.

In challenging the Commission's action in the matter of protective conditions, some of the carrier appel-

lants claim that the Commission violated Section 8(b) of the Administrative Procedure Act by failing to make findings (a) as to the contention that they will be injured by the traffic conditions because as a result of those conditions "the full force of the increased competitive strength of Penn-Central will be channeled against the unprotected carriers," and (b) as to the impact of the traffic conditions on competition between Penn-Central on the one hand and E-L, D&H and B&M on the other. B&O Brief, pp. 50-51. The former contention rests on the odd and unwarranted notion that absent the traffic conditions Penn-Central would compete against the "unprotected" carriers with less than full vigor, a notion that has no basis in experience and one that appellants have simply asserted in conclusory terms both here and below. As to the latter contention it is not clear what findings appellants would have had the Commission make. They presumably do not mean that the Commission was unaware that traffic conditions would temporarily lessen the impact of Penn-Central's competition on E-L, D&H and B&M, for that was the very reason for their adoption. And as to long-term competitive effects, the Commission determined that the conditions would be beneficial by helping to preserve the viability of E-L, D&H and B&M. Under the circumstances, the failure of the Commission to make specific findings on these claims is fully justified by this Court's decision in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 193, which recognizes that the law does not require findings on "every collateral condition advanced."

In light of all the foregoing we submit that these appellants' argument that the merger should be delayed

because it may be impossible to formulate satisfactory protective conditions is entitled to no weight. The Commission has already found strong reasons rooted in the public interest for the avoidance of delay. By authorizing consummation of the merger it has clearly expressed its conclusion and intention that the protective conditions finally formulated will provide all parties the protection to which they are entitled, and for the reasons shown that conclusion is plainly well founded.[19] Appellants are entitled to no more.

D. THERE IS NO BASIS FOR THE ARGUMENT THAT THE PROCEDURE UTILIZED BY THE COMMISSION WRONGFULLY EXPOSES E-L AND D&H TO SERIOUS INJURY

E-L and D&H argue that the action of the Commission in permitting consummation of the merger before the final protective conditions have been promulgated was unlawful because that action exposes them to the threat of serious injury in the face of the Commission's conclusion that they are entitled to protection against such injury. Their contention is that the traffic conditions which will go into effect immediately

[19] Some of the appellants take the Commission to task for failing to make a finding that it will be able to formulate protective conditions that reconcile the various competing interests and at the same time comply with the standards of the Interstate Commerce Act. B&O Brief, pp. 51-52. When the Commission authorized prompt consummation and reserved for further consideration the specific content of certain of the protective conditions it necessarily determined that in its judgment there were no insuperable obstacles to the fulfillment of its obligations under the statute. In the light of what has been said above there can be no doubt that there was a rational foundation for the Commission's determination that there are no insuperable obstacles to the fulfillment of this task. The Commission was not required to make a formal and ceremonial declaration of its confidence in its own competence to discharge its responsibilities. The appellants' argument to the contrary assumes that the sufficiency of administrative findings is a matter of incantation and not substance.

upon consummation of the merger are insufficient to protect them from serious loss of traffic and that there is no assurance that the Commission will ultimately prescribe provisions that appropriately compensate them for any traffic loss caused by the inadequacy of the traffic conditions. In addition, although E-L expressly disclaims reliance on any such argument (E-L Brief, pp. 20-21), D&H urges that "from the standpoint of the preservation of rail competition, a final determination as to whether Penn-Central should be required to provide any necessary capital loss indemnification" to compensate E-L, D&H and B&M for diminution in the value of their enterprises caused by the Penn-Central merger "is essential before the merger is consummated." D&H Brief, pp. 29-30.

It may be noted at the outset that the premise of the first argument referred to—that the traffic conditions will not effectively prevent any substantial diversion of traffic—was vigorously disputed by Penn and Central in the court below and is at best highly conjectural. The court below described these traffic conditions as "going far beyond anything in previous history" and held that E-L and D&H had made no showing "that would have led us to enjoin consummation of the merger if the Commission had been satisfied with the special traffic conditions in Appendix G." B&O J.S., p. A-28.[20]

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[20] E-L and D&H have from time to time argued that the fact that the Commission originally imposed indemnity provisions in addition to traffic conditions in itself demonstrates that the Commission recognized that the traffic conditions would not prevent substantial diversion. This does not of course follow. It is at least as reasonable to view the indemnity provisions simply as insurance, available in case the traffic conditions should for any reason fail to provide the broad protection for which they were designed, but by no means certain to come into play.

It may further be noted that the Commission found in its report on reconsideration that "the task of implementing a merger of this size is so vast and complex that its competitive effects will occur only gradually." 328 I.C.C. at p. 312. E-L and D&H are in no position to attack this finding since it was supported by the testimony of Mr. White, who was the chairman of the boards of both companies. It follows that there is no reason to believe that even were there no conditions whatever any significant traffic diversion of the kind feared would occur prior to the adoption of revised traffic conditions by the Commission if revision is shown to be warranted.

There is, moreover, a more fundamental infirmity in the argument of E-L and D&H. That argument is not based on the proposition that the Commission will be unable ultimately to devise traffic conditions that will protect E-L and D&H from substantial diversion after they become effective and financial conditions that will make those roads whole with respect to any interim diversion, but only on the proposition that it may determine not to do so. This argument ignores the fact that the Commission has already stated its intention to give E-L and D&H protection sufficient to guard them against any serious injury from loss of traffic as a result of the Penn-Central merger, and is thus bound to do so unless it presents adequate reasons for changing its mind. If the provisions that it ultimately prescribes are insufficient in this respect, E-L and D&H have the right to secure a remedy by resort to the courts. And if the Commission does change its mind and prescribe for E-L and D&H a degree of protection less than that to which it has heretofore held them to be entitled, those carriers again will have

the right to review the propriety of that redetermination under the standards of the Interstate Commerce Act.[21]

The argument is made by some of the carrier appellants, although conspicuously *not* by E-L and D&H, that there is "every likelihood" that the Commission eventually will find that the only possible method of adequately protecting the latter carriers is an indemnification provision of the kind included in the Commission's April 1966 report; that such a provision will ultimately be declared unlawful under the Interstate Commerce Act; and that it will thus appear after the merger is consummated that the Commission is unable to protect E-L and D&H to the degree that it has undertaken to do. B&O Brief, pp. 33-34.

We submit that this argument is entitled to no weight when disclaimed by E-L and D&H themselves, who are the only parties that could be injured if the argument were sound. Additionally the argument is fundamentally defective in two dispositive respects in that (a) there is simply no basis for the assumption that no measure other than such an indemnification provision could adequately protect E-L and D&H, and

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[21] The argument that the Commission deprived E-L and D&H of due process of law by permitting the protective conditions hearing to be deferred until after merger (see, *e.g.*, E-L Brief, p. 56) is without merit. The Commission has reserved plenary authority to require Penn-Central to compensate those carriers for any traffic that they may lose prior to the determination of final protective conditions. E-L and D&H thus could be unlawfully injured by the merger only if the protective conditions ultimately adopted by the Commission were inadequate, and hence a hearing before the finalization of those conditions fully protects their interests and satisfies every requirement of due process.

(b) an indemnification provision of this kind would in fact be entirely consistent with the standards of the Interstate Commerce Act.

The first of these points has already been discussed. See p. 38, *supra*. As to the second, the following observations are appropriate:

The argument of the appellants is that the indemnity provisions promulgated in the original Commission report, or any similar provisions, would violate Section 5(1) of the Interstate Commerce Act, which prohibits combinations among carriers for the "pooling or division * * * of earnings," unless authorized by the Commission on the basis of certain findings. In fact the Commission's indemnity provision was not a pooling within the meaning of Section 5(1). This is true for the reason given by the Commission, *i.e.*, that the arrangement would not have been a contract, agreement or combination entered into by the carriers involved.[22] It is true also for an even more fundamental reason. Although by virtue of the provision Penn-Central under certain circumstances could have been required to pay money to E-L, D&H and B&M, in no event could the latter have been required to pay money to the merged company. Because of this lack of mutuality in the arrangement, there was "no correlative surrender or contribution by the other parties such as is necessary to the existence of a pool in the

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[22] See 328 I.C.C. at p. 326. Appellants assert that the Commission's reasoning on this point was erroneous. We submit that the Commission's reasoning was correct, but in any event the relevant question is not whether the Commission's reasoning was sound but whether its ultimate legal conclusion that the provision was not a pooling was correct.

common interest of all, and from which all would share without regard to individual performance." *Atlantic Greyhound Corp.—Pooling,* 37 M.C.C. 543, 551 (1941). In a money pool either total revenues from individual performances are collected in common and the net distributed on a basis not related to each party's performance (see, *e.g., Express Contract, 1920,* 59 I.C.C. 518 (1920); *Pooling of Railroad Earnings and Service, Pullman Co.,* 268 I.C.C. 473 (1947)), or services of the parties are combined and the total revenue therefrom is collected in common and the net is then divided on a predetermined percentage basis (see, *e.g., Puget Sound-Portland Joint Passenger-Train Service,* 96 I.C.C. 116 (1925); *Twin Cities and Head of Lakes Joint Passenger-Train Service,* 107 I.C.C. 493 (1926)). The indemnity conditions originally prescribed by the Commission did not contain these features.

As noted by the Court of Appeals in *Kennedy* v. *Long Island R. Co.,* 319 F.2d 366, 374 (2d Cir. 1963), *cert. denied,* 375 U.S. 830, at the time the Interstate Commerce Act was passed "pooling" was defined as

> "simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.
>
> "See S. Rep. No. 46, 49th Cong., 1st Sess., Appendix p. 153 (1886)."

The indemnity provision under discussion was in no sense an understanding or agreement of the kind described in this passage, for under it E-L, D&H and

B&M under no circumstances would divide either their business or their profits with Penn-Central.[23]

Moreover, even if the Commission should conclude that any indemnity arrangement that it might see fit to direct was within the terms of Section 5(1), that conclusion would not make the arrangement illegal. As the court below recognized, the Commission has express statutory authority to permit a pooling if it makes certain findings.[24] In view of the fact that any indemnity arrangement would be temporary and would have the specific purpose of preserving the competitive viability of E-L, D&H and B&M and the service that they provide for the public, it is difficult to discern any obstacle to the making of the statutory findings by the Commission if it is assumed that such findings would be required.[25]

D&H argues that it is necessary that there be a final determination, prior to consummation of the merger, of the question whether Penn-Central can properly be required to compensate E-L, D&H and

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[23] If the indemnity conditions under discussion are a "pooling", it is difficult to see why a capital loss indemnity of the kind that E-L and D&H seek from Penn-Central would be any less so, since its specific purpose would allegedly be to compensate E-L and D&H with respect to traffic lost to Penn-Central. Yet in discussing a possible capital loss provision no appellant urges that it would have this defect.

[24] That the pooling "will be in the interest of better service to the public or of economy of operations, and will not unduly restrain competition." 49 U.S.C. § 5(1).

[25] The Commission also concluded that even if its indemnity condition did constitute a pooling, it had authority to impose it in a Section 5(2) proceeding without making the particular findings referred to in Section 5(1). Although appellants challenge this holding, it is manifestly correct. The limitations of Section 5(1) do not apply unless the Commission is exercising the authority conferred under that Section as opposed to its authority to impose conditions on a merger transaction under Section 5(2). Compare *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 295.

B&M for any loss in the capital value of those enterprises as a result of the merger. This argument is based on the premise that a decision that the Commission may not properly require such a capital loss payment might frustrate the inclusion of D&H in the N&W system if the Penn-Central merger is permitted to take place, and that it is not in the public interest that that eventuality be allowed to occur. D&H Brief, pp. 28-30.

It is true that N&W has argued to the Commission in the pending proceedings relating to inclusion of E-L, D&H and B&M in the N&W system that the price it might otherwise be required to pay for the properties of D&H should be reduced because the Penn-Central merger will make those properties less valuable. It does not follow, however, that even if the Commission should accept this argument the inclusion of D&H in the N&W system would be placed at hazard if Penn and Central are allowed to merge without being required to pay a capital indemnity to D&H. Rather, the result might simply be that the stockholders of D&H would have to accept a lower price for their enterprise. The bland assertion of D&H that it "obviously" should not be expected to suffer any loss in capital value caused by the Penn-Central merger (D&H Brief, p. 29) finds no support in law. Nothing in the Interstate Commerce Act, or in the reports or orders of the Commission in this case, can be read to guarantee to the shareholders of D&H protection against a diminution in the capital value of their enterprise, and contrary to the suggestion of D&H no such guarantee is required "from the standpoint of the preservation of rail competition." *Ibid.* The Commission has found that it is important to preserve

the competitive viability of D&H pending its inclusion in a major railroad system. No capital loss provision is required to accomplish this result.

Despite what has just been said Penn and Central recognize that it is possible that the Commission may choose to add a capital loss provision to the extensive protective conditions that it has already formulated.[26] They also recognize that if such a provision is adopted, and upheld by the courts, the carriers will if they merge be irrevocably committed to abide by the provision. These circumstances give to D&H all the protection to which it is entitled and more besides.

II. The Arguments of the United States Provide No Warrant for Delaying Consummation of the Merger

When this case was heard in the District Court, the Department of Justice expressly declined to take a position. In this Court it appears neither as appellant or appellee. It has, however, filed a memorandum urging that the Commission should have delayed the merger pending action by the Commission on the matter of protective conditions. In addition it urges that the Commission erred in failing to delay the merger until it had decided the "ultimate fate" of E-L, D&H and B&M. D. J. Memo., p. 19.

We submit that this latter question is not properly before this Court. The Department of Justice is not an appellant. It has no right or standing to tender

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[26] In the proposed report of Commissioner Webb issued on December 22, 1966, in the pending proceedings relating to inclusion of E-L and D&H in N&W, the Commissioner has ruled that there is no occasion to reduce the price which E-L and D&H are to receive from N&W by reason of any consequences of the Penn-Central merger. If this recommendation ultimately prevails, the question of capital loss indemnity will be moot.

questions of its own for decision. It expressly recognizes this fact by stating in its memorandum that it is avoiding the injection of "issues not presented by the appeals." D. J. Memo., p. 17, n. 11. The error reflected in the memorandum is the assumption made at the time of its filing that the question of delaying the merger pending determination of the matter of inclusion would be presented by the appeals. In fact, no appellant has included this question in its Statement of Questions Presented.

There is a second reason why the Department of Justice is not entitled to be heard here on the contention that it now seeks to advance. That contention—that the Commission should have delayed consummation of the merger until the completion of Commission action on the matter of inclusion—was never tendered by any party to the District Court or, indeed, even in petitions for reconsideration to the Commission itself. The only contention relating to the question of inclusion that was made in petitions for reconsideration to the Commission and in some of the complaints in the District Court was the altogether different contention that the merger should be delayed not until there had been Commission action on inclusion, but until the entire process of judicial review of that action had been completed and the inclusion of E-L, D&H and B&M in a major rail system was "accomplished or assured" (328 I.C.C. at p. 311), a process that D&H candidly admits might well take "several years". D&H Brief, p. 39. Since the contention now advanced by the Department of Justice was never presented to the Commission the circumstances call for application of the principle that administrative action should not be set aside by reason of agency failure to adopt a

course not urged upon it. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 333, 337.

There is an obvious reason for the Department's failure to embrace the proposition urged below that the Penn-Central merger should be delayed until the inclusion of E-L, D&H and B&M in a major rail system is definitely "accomplished or assured". To have done so would have been in derogation of the representation in the Department's memorandum that "the agencies of the Executive Branch that have substantive responsibilities for the formulation of economic and transportation policy believe that the merger is in the public interest and that its consummation should be promptly effected." D.J. Memo., p. 21.

The Commission in its report on reconsideration recognized that an attempt to delay the merger until the inclusion of E-L, D&H and B&M was actually accomplished or assured might well frustrate the merger entirely (328 I.C.C. at pp. 311-12), a result that would be squarely at odds with the professed views of the Executive Branch as to the desirability of the merger from the standpoint of the public interest. The Commission, which is well aware of the problems that the question of inclusion presents, also concluded that this risk outweighed the speculative possibility that no satisfactory resolution of that question could be found. *Ibid.* This is a matter of the precise kind whose resolution Congress has entrusted to the Commission and not to the courts or to the Department of Justice, and no adequate reason has been shown why in this case the courts should substitute their own judgment or that of the Department for that of the Commission in resolving it.

The Department's professed basis for its suggestion that there should be a further delay in consummation of the merger pending action on both protective conditions and inclusion is that consummation "may endanger the prospects for a successful resolution of the problem" of E-L, D&H and B&M. D. J. Memo., p. 22. Analysis of the reasons that the Department gives for this rather tentatively and qualifiedly expressed fear suggests that the reasons are not well considered. They are not only inadequate on their face but in some instances point to consequences that are irreconcilable with the Department's basic position that "prompt consummation of the Penn-Central merger is in the national interest," subject only to the qualification that "appropriate provision" should be made for "the other roads adversely affected." *Id.* at p. 31.

First as to the matter of conditions: The Department adverts to the difficulties that the Commission faces because of the conflicting contentions of the parties. It notes that "the non-protected roads appear intransigently opposed to any form of indemnity conditions, and the protected roads forcefully assert that they require not only revenue indemnification but capital indemnification." *Id.* at p. 26. Presumably the Department recognizes that the standards of Section 5(2) of the Interstate Commerce Act do not embody either the intransigence of N&W and C&O-B&O or the insistence of E-L and D&H that they should receive capital indemnification. The obligation of the Commission is to devise conditions that will satisfy the standards of the statute. The Department does not suggest that the Commission will be unable to discharge this obligation. It recognizes that the Commission "has the power and the recognized obligation to

hammer out a solution." *Ibid.* Instead the Department's asserted fear seems to be that while the Commission will achieve a solution the solution may be too late: "But the difficulties are sufficiently formidable to create an appreciable danger that the final resolution of the matter will come too late to save the protected roads if meanwhile they face the competition of Penn-Central without the full protective conditions that the Commission said were essential". *Ibid.*

This fear cannot survive even cursory consideration. The traffic conditions prescribed by the Commission will be effective upon merger and they or a revision of them will continue in effect until the protected roads are included in a major system. Any indemnity provisions that the Commission may prescribe will be retroactive to the date of consummation. Any capital loss indemnity that the Commission may prescribe could by definition operate only at the time that the protected roads are included in a larger system. In view of these facts there is simply no basis for any suggestion that in the interval of time between consummation and the prescription of conditions the financial position of the protected roads will be so impaired by the merger that they will be unable to survive. There is so little substance in this fear that even E-L and D&H themselves do not rely upon it.

Analysis of the Department's reasoning on the matter of inclusion similarly suggests that it has not sufficiently considered either the tenor of its comments or the consequences that they imply. The Department concludes its discussion of this point by suggesting that if consummation of the merger takes place now "the Commission may have lost two of its options for preserving the viability of the protected

roads—(1) inclusion of them in an independent Norfolk and Western, (2) their temporary preservation as independent carriers." D.J. Memo., p. 30. The concern as to loss of the first of these "options" is apparently predicated upon the position of N&W in the pending inclusion proceedings that it can absorb E-L, D&H and B&M only if its application to merge with C&O-B&O is granted. The suggestion rests upon a misapprehension of the nature of N&W's argument. That argument is not directed to the time of the consummation of the Penn-Central merger. It is an argument that if the merger is consummated, whether now or at some indefinite time in the future, N&W cannot include E-L, D&H and B&M unless it is allowed to merge with C&O-B&O.[27] Neither the nature of the contention nor the capacity of the Commission to deal with it will be affected by consummation now as compared with consummation at some deferred date. The second option referred to by the Department reflects its vague suggestion that "the proper solution might be" to preserve E-L, D&H and B&M as independent

[27] This argument was rejected by Commissioner Webb in his recommended report in the proceedings relating to inclusion by N&W of E-L, D&H and B&M, served December 22, 1966. In that report Commissioner Webb assumed that the Penn-Central merger will be consummated, and found that N&W should be required to include E-L and D&H in its present system on specified terms. The Commissioner found that the inclusion of B&M in N&W should be authorized at the present time but not compelled. This conclusion rested essentially on the ground that it would not be equitable to B&M and its stockholders to direct inclusion on the basis of the value of B&M that Commissioner Webb had found to be just and equitable. In arriving at this value, however, the Commissioner did not take into account any asserted diminution in the value of B&M alleged to result from the impact of the Penn-Central merger. For that reason his conclusion was not related to the impact of that merger.

carriers "for a time", whose duration is not specified. *Ibid.* This suggestion suggests an indefinite postponement and hence a likely frustration of the Penn-Central merger. It is a suggestion that cannot be reconciled with the announced judgment of the executive agencies that the merger is in the public interest and should be consummated promptly and is one that the Commission is not required to entertain so long as any other course of action is open to it.

There is one final comment that should be made about the substance of the Department's memorandum. Its contentions and suggestions appear to be directed essentially toward questioning the wisdom rather than the legality of the Commission's actions. The memorandum describes the procedure adopted by the Commission as one "which we are constrained to question" (D. J. Memo., p. 19); it expresses a concern "with the soundness of the Commission's decision not to require a delay in the consummation of the merger until the final conditions could be worked out" (*id.* at p. 24); it professes "fear lest the Commission may have impaired its ability to achieve a workable solution in the public interest" (*id.* at p. 27); and it suggests that if the Penn-Central merger is now consummated the Commission may be "drawn into approving the proposed Norfolk and Western—C&O-B&O merger as well" (*id.* at p. 29). These and comparable remarks in the memorandum indicate that the position of the Department derives from its belief that the Commission, in deciding questions of procedure that admittedly are committed to its discretion, has not been sufficiently farsighted; that it is not fully competent to protect and preserve its own administrative freedom of action; that its views of the public interest do not always co-

incide with those of the Department; and that in general the Commission has not exercised its statutory authority with the degree of wisdom that the Department believes that it should have brought to the task. It should hardly be necessary to point out that the resolution of this case cannot properly depend upon the views of the Department of Justice, or indeed of the courts, as to the "soundness" or wisdom of the Commission's action and that to the extent that the Department relies upon considerations of this character it raises no issues that are appropriate for judicial review.

III. The Commission's Findings with Respect to the Considerations Bearing on the Time of Consummation of the Merger Were Adequate to Support Its Conclusion That Prompt Consummation Was in the Public Interest

The carrier appellants argue that even assuming that the Commission had power to permit merger before the formulation of final protective conditions, in the circumstances of this case the decision of the District Court must be set aside because (1) the Commission relied on irrational and insufficient grounds in authorizing immediate merger and (2) the District Court upheld the Commission's action on grounds other than those relied on by the Commission.

At the threshold of this argument appellants contend that the Commission found in its original report that prompt consummation of the merger would not be in the public interest absent the particular protective conditions there prescribed and then in its report on reconsideration permitted prompt consummation without all of those protective conditions. This action is said to constitute a change of mind on the part of the Commission without adequate explanation,

in violation of the Administrative Procedure Act. See, *e.g.*, B&O Brief, pp. 53-54. It is, moreover, said to make impossible a judicial affirmance of the Commission's order because a court may not uphold agency action on grounds other than those relied on by the agency and here, it is claimed, the grounds of the agency action do not appear. See, *e.g.*, D.J. Memo., p. 25.

The short answer to appellants' argument is that it misconstrues the Commission's original report. The Commission did not there hold that the public interest would not permit prompt consummation of the merger except with the prior adoption of the particular protective conditions there promulgated. Rather the holding of the Commission with respect to E-L, D&H and B&M was simply that "unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger" and that "immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed" to protect them. 327 I.C.C. at p. 532. The holding was thus that the public interest requires protection of the named carriers, but there is no suggestion in the Commission's report that it deemed the particular conditions there prescribed to be the only possible means of accomplishing this end.[28]

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[28] In its original report the Commission also found that subject to the adequate protection of E-L, D&H and B&M "it would not be in the public interest to deprive the applicants of the immediate benefits of the merger or their shippers, of the improved service the merger will provide." 327 I.C.C. at p. 531. More than eight months have elapsed since this affirmative finding that delay was not in the public interest.

The only change of mind reflected in the Commission's report on reconsideration relates to the particular conditions that it had earlier promulgated. Appellants do not and could not contend that an administrative agency is without authority to change its mind if it gives an adequate explanation for the change, and the Commission's report on reconsideration is not lacking in this respect. Rather, the Commission specifically found that "certain modifications of appendix G may be desirable" because "the three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection." 328 I.C.C. at pp. 327-28.

Since there is no indication in the report on reconsideration of any change of the Commission's mind with respect to the proposition that E-L, D&H and B&M should be protected against serious injury as a result of the merger pending their inclusion in a major railroad system, there was no occasion for any explanation or justification of any such change of mind.

The carrier appellants split sharply in the remaining arguments that they offer in support of the proposition that the trial court should have set aside the Commission's orders because of defects in the findings relating to time of consummation. Thus D&H stresses the proposition that the Commission, in relying on the savings to the carriers and benefits to the shipping public that merger would produce, erred by failing to make specific findings as to the extent to which those benefits would be cancelled by the operation of the protective conditions during their term. D&H Brief, pp. 45-49. E-L does not even mention any such argument, but rather emphasizes alleged errors in the Commission's conclusions relating to the financial situa-

tion of Penn and Central and to the possibility that substantial further delay could destroy the merger and rob the public of its many benefits, including a solution of the problems of the New Haven. E-L Brief, pp. 65-77. Other carrier appellants focus on the contention that the "decisive reason" stated by the Commission for permitting Penn and Central to consummate the merger was a baseless fear that delay could result in liquidation of the New Haven, and that the District Court violated "a fundamental principle of administrative law" in rejecting this reason and nevertheless refusing to set aside the action allegedly based on it. B&O Brief, pp. 39-44.

D&H's argument ignores the fact that the Commission's reliance on savings and shipper benefits was based essentially not on consequences that will be felt immediately after the merger, but rather on ultimate consequences. That this is so is made explicitly clear by the statement in the Commission's report on reconsideration that:

> "A day's delay at the outset of the undertaking can only mean a day's delay at its conclusion, and, thus, every day that consummation is postponed denies the shipping and consuming public, as well as the management and owners of these railroads, the many benefits which we found stem from the transaction we approved." 328 I.C.C. at p. 312.

What consummation of the merger will do is to permit Penn and Central to *begin* the "program of extensive capital improvements scheduled over a 4-year period" referred to by the Commission in its original report (327 I.C.C. at pp. 489-90), and otherwise to take the first of the many steps that must be accomplished before the ultimate efficiencies and economies of the

merger can be realized. Although it may be true that protective conditions prescribed by the Commission will during their term to some degree decrease the immediate savings and efficiencies the merger would otherwise produce, there is no basis for any suggestion that they will seriously interfere with implementation of the plans which will eventually bring "large public benefits" (328 I.C.C. at p. 312) in terms of efficient and economical transportation.

Turning now to E-L, that appellant asserts that the Commission based its authorization of prompt consummation of the merger in part on the "vulnerable and highly sensitive financial situation" of Penn and Central, and argues that this finding is arbitrary because in 1965 and the first half of 1966 both carriers had earnings greater than in the immediately preceding years. E-L Brief, pp. 65-68. The fact is that in stating its reasons for concluding that prompt consummation of the merger would be in the public interest the Commission relied on no such finding. The words quoted by E-L occur in the portion of the Commission's report on reconsideration where it discussed not the question of the precise timing of the merger but rather attacks made on its basic merits, and are themselves a quotation from the Commission's original report dealing with this topic. In its discussion of the timing of the merger the Commission simply noted that the ultimate annual saving of more than $80,000,000 that the merger will produce for Penn-Central is a public interest factor entitled to consideration in light of the fact that the current high level of economic activity may not persist. 328 I.C.C. at p. 311. The latter conclusion is a plainly reasonable one and one, it may be noted, that E-L does not attempt to challenge.

Another reason for prompt consummation that E-L first assigns to the Commission and then challenges is that the stock ratio provided for in the merger plan might become unfair in the light of future events and thus block the merger. E-L Brief, pp. 72-75. The passage in the Commission's report on reconsideration to which E-L refers in connection with this point is, however, by no means limited to the stock ratio or any other single aspect to the merger agreement. The finding of the Commission rather was that

> "If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions." 328 I.C.C. at p. 312.

E-L argues that unless this passage is read as restricted to stock ratios it merely states "an irrelevant truism—that if a delay is long enough it may eventually thwart a merger." E-L Brief, p. 72. Truism this may be, but irrelevant it most emphatically is not. In the portion of the report in which the quoted passage appears the Commission was dealing with contentions which if accepted could well have deferred the merger for a period of years. It was altogether reasonable for it to apprehend that the prospect of such an additional delay—added to the more than five years that have already elapsed since the merger was originally negotiated—might well wreck the merger. It is evident that so long as a transaction of this kind is held in suspension the parties thereto not only face exceedingly vexing problems of personnel management and morale, but must continue to postpone capital expenditures that are important to continued efficiency as

separate carriers but would be largely wasted if the merger were to take place. It was reasonable for the Commission to recognize that problems of this nature —together with all the other difficulties involved in holding a transaction of this magnitude in an executory posture—would present a real danger to the continued viability of the merger plan if substantial additional delay in and uncertainty with respect to consummation existed. And in light of the Commission's findings that this merger will serve the public interest in important respects—a view that some of the appellants have in the past purported to share—it was reasonable for it to give this danger weight in rejecting pleas that could result in substantial additional delay and uncertainty.

The remaining reason for prompt consummation claimed by E-L to have been erroneously relied on by the Commission relates to the situation of the New Haven. E-L suggests that the Commission gave "substantial weight" to a belief that a delay of months would imperil the New Haven even if it was clear that the merger would thereafter take place. E-L Brief, p. 71. It then urges that the Commission was in error in finding that such a delay would have this result; that the District Court so found; and that the District Court at that point should have considered "to what extent the Commission's error had influenced its conclusion that there should be a prompt consummation of the merger." *Id.* at p. 68. Other carrier appellants go further. They state that the Commission's apprehension that a delay of months might be ruinous to the New Haven was the "decisive" and "crucial" reason stated by the Commission for requiring immediate consummation, and that since the District Court was

not persuaded by that reason it had no choice but to set aside the Commission's order. B&O Brief, pp. 39-44.

We believe that appellants have misread both the Commission's decision and that of the District Court. The Commission's discussion of the relevance of the New Haven situation to the question of time of consummation was not an expression of concern that a mere delay in the merger would drastically affect that situation even if it were clear that the merger would be ultimately consummated. It was instead an expression of concern lest continued delay, whether of years or of months, coupled with uncertainty as to whether the merger would ever be consummated, might prevent satisfactory solution of the New Haven problem either by frustrating the merger entirely or by creating a situation in which the New Haven would be forced into liquidation because of doubts that the merger would ever take place. The District Court did not reject this conclusion. What it did reject was a contention made to it in oral argument that delaying the merger would *delay* the New Haven inclusion. To the extent that its opinion discusses the altogether different proposition that a delay of several months could imperil the New Haven in the ways mentioned, the court stated only that it did not "rest heavily" on it. B&O J.S., p. A-22.

In any event, there is no basis for the assertion that the point under discussion played a "decisive" or "crucial" role in the Commission's decision to permit the merger to go forward promptly, in the sense that the Commission would not have reached the same conclusion as to the desirability of prompt consummation without it.

In attempting to demonstrate that this point was in fact decisive, in the Commission's mind, of the ques-

tion whether to delay consummation until the final determination of the issue of protective conditions had been completed, the appellants are forced to take substantial liberties with the pertinent portion of the Commission's report on reconsideration. Thus they describe that portion of the report (328 I.C.C. at pp. 311-13) as if the only reference therein to the significance of a delay of months was one directed to the problems of the New Haven, and as if the entire remaining discussion was directed solely to the question whether there should be a delay of several years until the inclusion of E-L, D&H and B&M in a major rail system. This is not an accurate description of the report. The major part of the discussion, directed to the question of service benefits to the public and savings to the carriers, is *pro tanto* of no less significance to a delay of months than to one of years, and there is no basis for the contention that the Commission did not rely on these benefits in finding that *no* delay, whether of months or years, was warranted. The Commission's concluding "moreover" sentence, relating to the situation of the New Haven, can at most be regarded as no more than an alternative reason for its denial of delay pending final action on protective conditions. Thus even if the District Court had in fact rejected it, which it did not, such a rejection would not have warranted upsetting the Commission's action.

The carrier appellants also argue that in affirming the action of the Commission the District Court wrongfully relied on its own "beliefs, suppositions and conjectures." See, *e.g.*, E-L Brief, p. 77. To support this argument appellants point to a few passages selected from the District Court's lengthy and

comprehensive opinion that are said to reflect ideas not found in the reports of the Commission.[29]

We submit that it is unnecessary to consider the correctness of appellants' contention that the quoted passages in fact represent the District Court's "beliefs, suppositions and conjectures." Such a contention is irrelevant under any circumstances absent a plausible showing that the ideas expressed in the passages referred to played a role in the District Court's decision so vital that the court might reasonably have been expected to reach a different result without them. Measured by this standard, appellants' argument is insufficient on its face.

Moreover, appellants contend that the posture of this case in this Court is such that it should be treated in substance as if it were here on appeal from a final rather than an interlocutory judgment. Under such circumstances, appellants' burden is to show not merely error in the trial court's decisional process but error in the action of the Commission that they seek to enjoin. Viewed in this light, their argument is simply beside the point.

IV. The Non-Carrier Appellants Have Failed To Show Any Right to Relief

The remaining question is whether consummation of the merger should be enjoined on the basis of the attack that Shapp and the City of Scranton make on

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[29] Thus, for example, they refer to a passage in which the court parenthetically stated its suspicion that this litigation in large part derives from the "jockeying" of some of the appellants "for price and position in respect of other mergers" (B&O J.S., p. A-39), and to the court's observation that if N&W, E-L, D&H and B&M were to cooperate the inclusion of the latter three roads in the former could probably be accomplished quite expeditiously (*id.* at p. A-10).

the basic legality of the Commission orders authorizing the merger. As we shall show, not only do Shapp and Scranton fail to offer any arguments that demonstrate the illegality of the Commission's action, but under established principles of law neither has standing to challenge the Commission's orders in the courts.

A. NEITHER SHAPP NOR SCRANTON HAS STANDING TO CHALLENGE THE COMMISSION'S ORDERS IN THE COURTS

In his complaint below Shapp described himself as a "Pennsylvania businessman and a citizen of the Commonwealth of Pennsylvania," "a stockholder of The Pennsylvania Railroad Company," and "an authority on the subject of Pennsylvania economic history" who "has conducted studies on economic and transportation problems." In his brief below he asserted that the consummation of the merger would injure him as a "member of the public who will be generally injured by the merger." His papers in this Court add nothing by way of allegations relating to standing, and indeed are conspicuously silent on this score.

The quoted allegations are insufficient to show standing. Shapp is not entitled to litigate the validity of orders of the Interstate Commerce Commission as a member of the general public or as a representative of his own concept of the public interest. This Court has held that under the Interstate Commerce Act a litigant has no standing to seek judicial review of a Commission order in the absence of a showing that the order injures, or threatens to injure, the litigant's own legal interests. See *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *Pittsburgh & W. Va. R. Co.* v. *United States*, 281 U.S. 479, 486; *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249, 255. See

also *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913 (S.D.N.Y. 1961); *Atchison, T. & S.F. R. Co.* v. *United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892.

This Court has also held that the fact that a litigant has been permitted to intervene before the Commission "does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened illegal injury to it." *Pittsburgh & W. Va. R. Co.* v. *United States, supra,* at p. 486. And if the litigant has no independent standing of his own the fact that, as a matter of procedure, he has intervened in a suit brought by another instead of instituting an independent suit is immaterial. *Alexander Sprunt & Son* v. *United States, supra,* at p. 255.

Shapp's allegation that he is a stockholder of Penn adds nothing to his standing. Shapp has made no showing that his financial interest as a stockholder is threatened by the Commission's orders and, in fact, he is not attempting to vindicate or to protect that interest. In the proceedings before the Commission Shapp did not attack the merger on the ground that its financial terms were unfair to or would otherwise inflict injury upon the stockholders of Penn. Indeed, in his petition for reconsideration before the Commission Shapp did not even refer to his position as a stockholder of Penn much less contend that the terms of the merger would inflict personal injury upon him as a stockholder. In his memorandum in the District Court, Shapp merely asserted that "in his capacity of a stockholder of the PRR plaintiff is of the opinion that his interests will be better protected if the PRR does not merge with NYC" without attempting to give any content to this vague and conclusory assertion. In

these circumstances Shapp's position as a stockholder provides no support for his attempt to litigate at large the legality of the Commission's orders. The language of this Court in *Pittsburgh & W. Va. R. Co.* v. *United States, supra,* at p. 487, applies precisely to Shapp's alleged interest as a stockholder. His interest "does not differ from that of every investor" in the securities of Penn or "from an investor's interest in any business transaction or lawsuit of his corporation." And the alleged harm which Shapp vaguely hypothesizes "is the indirect harm which may result to every stockholder from harm to the corporation." This Court held in the cited case that this kind of stockholder's interest is "clearly insufficient" to confer standing to seek judicial review of a Commission order. *Ibid.*

Scranton, like Shapp, has made no showing of any legal interest that gives it standing to seek judicial review of the Commission's orders. Its allegation that "it is an integral part of Commonwealth of Pennsylvania, and thus will suffer from the diversion of PRR business and the failure to route maximum traffic across Pennsylvania, even though City of Scranton is not directly served by PRR" (Scranton Brief, p. 14) is plainly insufficient to show a justiciable legal interest, particularly in light of the fact that Pennsylvania itself does not oppose the merger.

Beyond allegations of this nature Scranton appears to take the position that it is entitled to attack the orders as *parens patriae* for its residents or as a representative of the general economic interests of the public. Thus it alleges that "diversion of traffic from E-L, D&H and CNJ will result in smaller railroad payrolls with the concomitant reduction in bank deposits, retail sales, real estate values, among other

things, and adversely affect the business interests in a community." Scranton Brief, p. 14.[30] We submit that under the decisions Scranton has no standing to litigate orders of the Interstate Commerce Commission simply as a representative of the general economic interests of its population, particularly when the state of which it is a creature declines to support its position. *Jersey City* v. *United States,* 101 F. Supp. 702 (D. N.J. 1950); *Minnesota* v. *Benson,* 274 F. 2d 764 (D.C. Cir. 1960). See also *Moffat Tunnel League* v. *United States,* 289 U.S. 113; 9 Geo. Wash. L. Rev. 648, 680-81 (1941).

B. THE ARGUMENTS OF SHAPP AND SCRANTON PRESENT NO ADEQUATE REASON FOR ENJOINING THE MERGER

Shapp and Scranton assert that the Commission adopted an erroneous definition of the "public interest" and as a result ignored or did not adequately consider certain of their objections to the merger. This assertion rests on a passage in the proposed report of the Examiners which the Commission affirmed. Examiners' Report, pp. 282-83; 327 I.C.C. at pp. 481-82, 494. In that passage the Examiners adopted, as they were obliged to do, the definition of the term "public interest" in Section 5(2)(b) that was set forth by this Court in *United States* v. *Lowden,* 308 U.S. 225, 230, and *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25. In compliance with that definition the Examiners held that in appraising the "public interest" the Commission was limited to considering matters that related to the adequacy and

[30] Despite the fear thus expressed, Scranton chose not to participate in any way in the supplemental proceedings directed by the Commission with respect to protective conditions, although as a party of record in the original case it had an unqualified right to do so.

efficiency of transportation services and facilities. The Examiners made this holding in rejecting arguments that the merger should be disapproved (1) because it might reduce tax receipts and thus hamper the conduct of public functions by certain governmental bodies and (2) because by diminishing employment to railroad workers residing in certain areas it might have repercussions on businesses supplying goods and services to such workers. Examiners' Report, pp. 280-81. The Examiners said (*id.* at pp. 282-83):

> "The Interstate Commerce Commission, while having broad jurisdiction in the regulation of railroads generally, is confined by its statutory authority in considering 'the public interest' as it applies to the 'adequacy of a transportation service', and it has no authority to guarantee a certain level of employment at a particular location, nor to gauge or consider the effect which divestment by railroads at a given point would have upon the taxing structure of particular states, counties, communities, or other political subdivisions."
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> * * * *
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> "It is eminently clear that neither the taxing structure, the level of employment in a given area, nor other arguments running to these essential questions bear any relationship to transportation, nor can we find any provision of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic, political or geographic areas or individual businesses located therein."

The Examiners committed no error of law in this holding. It is not disputed that the holding was fully justified by the decisions in *Lowden* and *New York Central Securities Corp., supra.* The argument rather

seems to be that since these cases were decided the Transportation Act of 1940 and certain other federal statutes have amended and extended the "public interest" standard of Section 5(2)(b). There is nothing in this contention. The cases decided under Section 5(2)(b) since the Transportation Act of 1940 was passed make it plain that the Act did not change in any respect the public interest standard of Section 5(2)(b). See *Brotherhood of Maint. of Way Employees* v. *United States,* 221 F. Supp. 19, 25 (E.D. Mich. 1963), *aff'd per curiam,* 375 U.S. 216; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 83; *Schwabacher* v. *United States,* 334 U.S. 182, 193. Indeed, this Court has said that although the 1940 Act changed "the means" it did not change "the end" which the Commission is authorized to achieve. *County of Marin* v. *United States,* 356 U.S. 412, 417.

No elaborate discussion is necessary to dispose of the suggestion that the Employment Act of 1946, the Area Redevelopment Act of 1961, the Manpower Development and Training Act of 1962, the Economic Opportunity Act of 1964, the Appalachian Regional Development Act of 1965 and the Mass Transportation Act of 1966, considered collectively or individually, amended the public interest standard of Section 5(2)(b) or otherwise extended the powers of the Interstate Commerce Commission. That suggestion cannot survive even a cursory reading of the provisions of these statutes.

The Commission's consideration of the interests of areas and communities, including Scranton, complied with the standards of Section 5(2)(b). Both the Examiners and the Commission considered the effects of the proposed merger on the adequacy and the

efficiency of the transportation services and facilities that would be available to particular areas, states and communities and made findings on those effects that were sufficient in form and supported by substantial evidence. Examiners' Report, pp. 229-86, particularly at pp. 283-86; 327 I.C.C. at pp. 491-93. The Commission did not commit any error of law by thus confining its attention to the transportation aspects of the proposed merger.[31]

Shapp argues at length (Shapp Brief, pp. 26-30), and Scranton appears also to assert (Scranton Brief, p. 12), that the Commission erred in applying a "broad 'public benefits' test," rather than the statutory "public interest" test in directing an opportunity for inclusion of the New Haven in the merged Penn-Central. In making this argument, these appellants seize on the fact that the Commission in discussing the merits and timing of the merger both in its original report and its report on reconsideration on occasion referred to "public benefits" and "benefits to the public" rather than "public interest." See, *e.g.*, 328 I.C.C. at p. 306. It is apparent, however, from a reading of the pertinent passages that in employing the former terms the Commission was in no way indicating its adherence to a standard different from the statutory standard.

In connection with their argument, Shapp and Scranton urge that the Commission, in finding that the opportunity that the merger offered for a solution of the problems of the New Haven was a factor militating strongly toward its approval, must have applied

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[31] The Commission dealt with generalized arguments made by Shapp and Scranton that Pennsylvania business interests would be disadvantaged by the merger, finding specifically that they would not be disadvantaged. 327 I.C.C. at pp. 492-93.

a "public benefits" standard that was different from the "public interest" standard. Shapp Brief, pp. 26-30; Scranton Brief, pp. 12-13. The premise of this argument appears to be that the Commission could not properly have found inclusion of the passenger and freight operations of the New Haven in the Penn-Central system to be in the public interest because that inclusion would allegedly require "citizens of states lying between the Mississippi and Hudson Rivers to subsidize the passenger operations in New England" in the teeth of a "firm Congressional policy", claimed to be expressed in the Transportation Act of 1958, "that passenger service is not to be subsidized by the shippers of freight." Shapp Brief, pp. 28-30. This argument is wholly without merit. Even assuming the correctness of appellants' characterization of the policy of the Transportation Act of 1958, an inclusion of New Haven's operations in the Penn-Central system would in no way be inconsistent with that policy. The merged company, no less than the present New Haven, would be free to take advantage of the Transportation Act of 1958 to the extent authorized by the terms of that statute, and the Commission expressly emphasized that the merger savings should not and would not be permitted to be a subsidy for the New Haven passenger operations. 327 I.C.C. at pp. 523-25.

Shapp attacks the orders of the Commission on the ground that the Commission did not make adequate findings on the competitive consequences of the merger and did not properly appraise the merger in the light of the policy of the antitrust laws. Shapp Brief, pp. 30-34. This argument does not require extensive discussion. Both the Examiners in their proposed report and the Commission in its reports considered in detail

the competitive consequences of the merger and in the course of that consideration gave appropriate weight to the policies of the antitrust laws and to the concepts that have been developed in antitrust decisions for measuring the effect of mergers on competition. See Examiners' Report, pp. 160-95, 419-39; 327 I.C.C. at pp. 502-20; 328 I.C.C. at pp. 307-10.

Shapp asserts that there is a distinction between "carrier competition" and "market competition," which he describes as competition that exists when two carriers serve a common consuming market from different points of origin, and argues that the Commission failed to consider "market competition." Shapp Brief, pp. 31-33. The argument rests upon an incorrect reading of the Commission's report. The Commission specifically said that it was not confining its attention to the competition afforded by Penn and Central between common points of origin and destination but on the contrary was considering competition in terms of "origin, destination or bridge service." 327 I.C.C. at p. 509. See also *id.* at pp. 512-14. Shapp's citation of the transportation of coal from mines served exclusively by different carriers as "an example of market competition" allegedly ignored by the Commission is particularly inexplicable in view of the fact that the Commission discussed the effect of the merger on coal traffic in terms that make it clear that it was considering "market competition" as well as "carrier competition." *Id.* at pp. 516-17.

Shapp makes no concrete claim that the Commission failed to give adequate consideration to the effect of the merger upon "market competition" in any specific product or specific geographical area. As the Commission declared, the merger applicants participate

"in the transportation of practically the entire gamut of commercial commodities originating and terminating in virtually all sections of the country, and at overseas points as well." 328 I.C.C. at p. 309; 327 I.C.C. at p. 510. It can hardly be contended that the Commission was required to make formal findings as to the competitive consequences of merger for each product transported by the two carriers in each geographical area served by them, and Shapp does not even suggest that he or any other party to the Commission's hearings introduced evidence as to market competition in particular commodities which the Commission failed properly to appraise.

The Examiners also considered at length the argument of Shapp that the merger was objectionable because interlocking directorates between Penn-Central, on the one hand, and large commercial corporations not engaged in transportation activities, on the other, might create possibilities for the practice of reciprocity. Examiner's Report, pp. 93-100. The Commission adopted the findings and conclusions of the Examiners. 327 I.C.C. at pp. 481-82.

In its opinion denying the motions for a temporary injunction the District Court held that the initial report of the Commission "fully complied with the directions of the Supreme Court in such recent decisions as *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 186 (1959), and *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965)." B&O J.S., p. A-6. We submit that this characterization of the report, like the Commission's own characterization of it as containing a "comprehensive discussion of competition and the antitrust laws" (328 I.C.C. at p. 309), was entirely warranted.

Shapp and Scranton emphasize the improvement in the financial condition of Penn and Central in 1964 and 1965 and assert that this improvement should have been given decisive weight by the Commission in determining whether the economic situation of the railroads justified their merger. Shapp Brief, pp. 12-19; Scranton Brief, pp. 6-7. The Commission was aware of this improvement but declined to regard it as controlling. The Commission pointed out that it "would be unwarranted" to regard the conditions existing in 1964 and 1965 as establishing a trend toward permanent improvement in the finances of the two carriers and supported this view by reference to the record. The Commission also pointed out that even in 1964 and 1965 the return earned on investment by the two roads was low as compared with that earned by other industrial enterprises and even lower than the return on Government bonds. It found that the rates of return of the two roads have been too low to guarantee confidence in their financial soundness, to maintain credit, and to raise funds necessary for the discharge of their public duty. See 327 I.C.C. at pp. 495-96, 498-500.

Shapp and Scranton also assert that the Commission accepted erroneous projections of traffic volume for the future, pointing out that whereas in those projections it was estimated that Penn and Central freight traffic would amount to 69,000,000 ton miles in 1965, the witness Keyserling (now counsel for Scranton) correctly estimated that traffic volume would rise to 89,000,000 ton miles in that year. Shapp Brief, pp. 14-15; Scranton Brief, pp. 6-7.

The validity of the Commission's finding that the proposed merger would be in the public interest does

not turn upon the accuracy of a traffic projection for one year. Indeed it does not depend upon acceptance of the traffic projections for a longer period of time made by the two applicant railroads nor does it require the rejection of the conflicting projections offered by the opponents of the merger. The Commission made this plain in its initial report where it observed that even if it accepted the economic projections of the Department of Justice and certain Pennsylvania communities "there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so." 327 I.C.C. at p. 495. The Commission's findings with respect to the financial prospects of the two applicant railroads were based primarily on the facts with respect to their rates of return on investment and, as we have pointed out, the Commission found that even in 1964 and 1965 those rates of return were so low as to create doubts about the capacity of the two carriers to continue to provide the kind of common carrier service that the public interest requires. 327 I.C.C. at pp. 499-501.

The Commission found that "the transaction will permit more economical and efficient use of the applicants' transportation facilities" and that the resulting economies "will redound in a large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates." 327 I.C.C. at p. 491. In its opinion denying the motions for a preliminary injunction the District Court held that there was "ample supporting evidence" for these findings and added that "these considerations do not lose their force because of the marked recent improvement in the applicants' earn-

ings." B&O J.S., p. A-19. This holding was fully supported by the record and is entitled to affirmance.

Shapp and Scranton assert that in approving the merger the Commission acted to curtail overall railroad capacity in line with the allegedly erroneous traffic projections referred to above. See, *e.g.*, Shapp Brief, p. 19. The Commission in fact found that the merger would improve the applicants' ability both to provide transportation services needed by a growing economy and to perform their transportation obligations during periods of economic pause or recession. The merger, the Commission said, would "open the way for the development of a modernized railroad system trimmed of unnecessary plant, unencumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit." 327 I.C.C. at p. 496. Contrary to the assertions of Shapp and Scranton, the Commission found that the merger would create new capacity (*id.* at pp. 489-92), would "motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment" (*id.* at pp. 501-02), and would prevent substantial disinvestment of funds which would impair the applicants' ability to modernize and improve services essential to economic growth (*id.* at pp. 499-501).

Additional arguments with which Shapp and Scranton attack the Commission's approval of the merger are essentially arguments that the Commission erred in deciding questions of economic policy that are committed to its judgment. Thus they asserted in the

District Court that the merger "is in conflict with the national policy of maximum employment, production and purchasing power * * *" and that the present state of the country's economy does not "warrant a contraction of railroad facilities," and in this Court that the Commission adopted a "doom-and-gloom philosophy" (Shapp Brief, p. 7) and that if the merger is "implemented it will be impossible to attain the economic growth goals of the Nation" (*id.* at p. 15). These and similar arguments do not demonstrate either that the Commission's findings are insufficient or that they are unsupported by substantial evidence. They are arguments that simply quarrel with the Commission's appraisal of complex questions of public policy and transportation economics that Congress has authorized it to decide. This Court has held that within this area of judgment the wisdom and experience of the Commission and not of the courts must determine whether a proposed merger is consistent with the public interest. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88; *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 188.

Shapp's remaining points can be dealt with in brief compass. The contention that the merger must be deferred until the inclusion of the New Haven is absolutely assured (Shapp Brief, pp. 34-35) is self-defeating, in light of the Commission's finding that a substantial delay might well defeat the merger and thereby eliminate the only possible solution of that carrier's problems. The argument that the Commission lacks power to impose temporary traffic conditions that to some degree restrict rate competition (*id.* at pp. 35-36) finds no support in the terms of the statute, and is directly inconsistent with the authority given to the

Commission under Section 5(2)(b) to promulgate any terms and conditions that may be just and reasonable in the circumstances. The plea for consolidation of this proceeding with other litigation (*id.* at pp. 36-37) is answered by the discussion at pp. 19-24, *supra*, of the amply sufficient considerations that motivated the Commission to authorize prompt consummation of the merger. And the demand for judicial review (*id.* at pp. 38-39) is mooted by the fact that Shapp has had the fullest opportunity to be heard on his contentions before both the District Court and this Court.

Other objections that are mentioned by Shapp or Scranton or both but which are given less prominence in their arguments are adequately answered by the Commission's own discussion and findings, as for example, the contention that the Commission erred in not prescribing conditions to protect the employees of other carriers (see 328 I.C.C. at pp. 313-14);[22] the contention that the Commission did not make adequate findings with respect to the impact of the proposed merger upon the national defense and the postal service (see 327 I.C.C. at p. 520); and the contention that the Commission should have reopened the proceedings to receive certain new or additional evidence (see *id.* at pp. 484-86).

The majority of the court below held that the arguments with which Shapp and the City of Scranton attacked the merits of the Commission's orders were so lacking in substance that these appellants had no reasonable prospect of success upon a final hearing—

[22] A decisive refutation of this argument is the fact that the employees referred to do not appear to share Shapp's apprehension that they have been inadequately protected, else they would doubtless be here as additional appellants.

a holding with which the dissenting judge did not disagree. The holding of the court below was clearly correct. These appellants have made no showing to this Court that justifies a remand for an additional hearing of the purely legal issues which they pose. We submit that their criticisms of the Commission's orders should be finally rejected and the Commission's finding that the merger of the Penn-Central is in the public interest affirmed.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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